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No. 03-214

In The

Supreme Court of the United States

MARGARET A. APAO,

Petitioner,

v.

THE BANK OF NEW YORK, As Trustee For Amresco Residential Mortgage Loan Trust 1997-3 Under The Pooling & Servicing Agreement Dated As Of September 1, 1997, SAN DIEGO HOME LOANS, INC., a California corporation, and ARM FINANCIAL CORPORATION, a California Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT ARM FINANCIAL CORPORATION'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a private mortgagee's non-judicial foreclosure and sale of a mortgaged residence as permitted by Hawaii's non-judicial foreclosure statute, Haw. Rev. Stat. § 667-5, is an action properly attributable to the State of Hawaii or the federal government.

STATEMENT PURSUANT TO RULE 29.6

There is no parent corporation or any publicly held company that owns 10% or more of the stock in Respondent ARM Financial Corporation.

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STATUTE INVOLVED

Hawaii Revised Statutes § 667-5 Foreclosure under power of sale; notice; affidavit after sale.

When a power of sale is contained in a mortgage, the mortgagee, or the mortgagee's successor in interest, or any person authorized by the power to act in the premises, may, upon a breach of the condition, give notice of the mortgagee's, successor's, or person's intention to foreclose the mortgage and of the sale of the mortgaged property, by publication of the notice once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale, in a newspaper having a general circulation in the county in which the mortgaged property lies; and also give such notices and do all such acts as are authorized or required by the power contained in the mortgage. Copies of the notice shall be filed with the state director of taxation and shall be posted on the premises not less than twenty-one days before the day of sale.

Any sale, of which notice has been given as aforesaid, may be postponed from time to time by public announcement made by the mortgagee or by some person acting on the mortgagee's behalf. The mortgagee shall, within thirty days after selling the property in pursuance of the power, file a copy of the notice of sale and the mortgagee's affidavit, setting forth the mortgagee's acts in the premises fully and particularly, in the bureau of conveyances.

The affidavit and copy of the notice shall be recorded and indexed by the registrar, in the manner provided in chapter 501 or 502, as the case may be.

This section is inapplicable if the mortgagee is foreclosing as to personal property only.

STATEMENT OF THE CASE

Petitioner Margaret Apao obtained a mortgage on her Honolulu residence in June of 1997 from Respondent San Diego Home Loans, Inc. The mortgage agreement included a power of sale clause providing that if Petitioner defaulted on her mortgage payments, the borrower would notify Petitioner of her default, inform Petitioner what she needed to do to cure the default, and give her not less than 30 days to effectuate the cure. If the default was not cured, the lender could, at its option, invoke a power of sale.

Hawaii Revised Statutes ("HRS") § 667-5 provides in pertinent part:

> When a power of sale is contained in a mortgage, the mortgagee, or the mortgagee's successor in interest . . . may, upon a breach of the condition, give notice of the mortgagee's . . . intention to foreclose the mortgage and of the sale of the mortgaged property, by publication of the notice once in each of the three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale. . . . Copies of the notice shall be filed with the state director of taxation and shall be posted on the premises not less than twenty-one days before the day of sale.
>
> . . . The mortgagee shall, within thirty days after selling the property in pursuance of the power, file a copy of the notice of sale and the mortgagee's affidavit, setting forth the

> mortgagee's acts in the premises fully and particularly, in the bureau of conveyances.

Three years into her mortgage, Petitioner notified San Diego Home Loans that she intended to cancel and rescind the mortgage and make no further payments because of perceived violations of the Truth In Lending Act, 15 U.S.C. § 1601. Respondent Bank of New York, which had taken assignment of San Diego Home Loans' interest in the Apao mortgage, caused Respondent ARM Financial Services ("ARM") to conduct a non-judicial foreclosure and sale of Petitioner's residence in accord with HRS § 667-5. ARM followed the provisions of the contract and the statute and sold the property at a foreclosure sale in August of 2000.

Petitioner thereupon sued each of the Respondents claiming that their actions under HRS § 667-5 violated her federal and state constitutional due process rights. She did not name any state or federal defendants. Respondent ARM moved to dismiss on the ground that Petitioner's complaint failed to state a claim because it did not plead the requisite state action needed to sustain a constitutional challenge. In response, Petitioner argued, in part, that use of a "power of sale" provision in her mortgage contract was required by federal regulatory agencies. She cited only one federal regulation to support this argument, 24 C.F.R. § 203.17. The District Court granted ARM's motion.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the District Court. Petitioner sought rehearing, which was also denied by the court of appeals. This petition followed.

ARGUMENT

I. THE NINTH CIRCUIT'S RULING WAS PROPERLY DECIDED IN ACCORD WITH THIS COURT'S DECISION IN *FLAGG BROTHERS, INC. V. BROOKS*

The Ninth Circuit held that Respondent ARM's reliance on Hawaii's non-judicial foreclosure statute to secure the foreclosure and sale of Petitioner's residence did not implicate state action. In reaching this determination, the court of appeals correctly noted that Petitioner's case was materially similar to the facts underlying this Court's ruling in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), where a creditor enforced a lien through a purely private, non-judicial sale authorized under state law. This Court held there was no state action even though the lien was authorized by the state's legislative enactment of the Uniform Commercial Code. In *Flagg*, as in the instant Petition, the debtor argued first, that the legislative grant of the power of sale was a delegation of a traditionally governmental function, and second, that the statutory authorization constituted state action because the State had encouraged use of the procedure through its enactment of the contested statute. This Court disagreed. The Court noted that it had "never held that a State's mere acquiescence in a private action converts that action into that of the State." *Id.* at 164. The Court explained:

> It is quite immaterial that the State has embodied its decision not to act in statutory form. If New York had no commercial statutes at all, its courts would still be faced with the decision whether to prohibit or to permit the sort of sale threatened here the first time an aggrieved bailor came before them for relief. A judicial decision to deny relief would be no less an

> "authorization" or "encouragement" of that sale than the legislature's decision embodied in this statute.

Id. at 166. The Court added that "the State of New York has not compelled the sale of a bailor's goods, but merely announced the circumstances under which its courts will not interfere with a private sale." *Id.* The Court added:

> Indeed, the crux of [plaintiff's] complaint is not that the State *has* acted, but that it has *refused* to act. This statutory refusal to act is no different in principle from an ordinary statute of limitations whereby the State declines to provide a remedy for private deprivations of property after the passage of a given period of time.

Id. at 166 (emphasis in the original).

Petitioner has advanced no sound reason for the Court to abandon its holding in *Flagg Brothers*. The determination was consistent with then extant state action law and remains so today. The Ninth Circuit properly applied this otherwise sound ruling to a very similar fact pattern. The application was correctly undertaken and does not call for a review by this Court.

II. THE NINTH CIRCUIT'S RULING IS IN ACCORD WITH A LONG LINE OF UNBROKEN CIRCUIT COURT PRECEDENT

Petitioner's challenge echoes those brought against state non-judicial foreclosure statutes in the 1970s. Six circuits, including the Ninth Circuit, then held that such actions failed to state constitutional claims for want of state action. *See Bryant v. Jefferson Federal Savings And Loan Assoc.*, 509 F.2d 511 (D.C. Cir. 1974) (District of

Columbia non-judicial foreclosure statute creates no right to a power of sale; it simply sanctions what the parties have contracted to); *Levine v. Stein*, 560 F.2d 1175 (4th Cir. 1977), *cert. denied*, 434 U.S. 1046 (1978) (Virginia's non-judicial foreclosure statute does not involve sufficient state action to permit a constitutional challenge); *Barrera v. Security Building & Investment Corp.*, 519 F.2d 1166, 1174 (5th Cir. 1975) (fact that Texas' non-judicial foreclosure statute recognizes a change in ownership from the forced sale does not create sufficient state action; likewise, fact that state has regulated the activity does not mean that conduct taken in conformity with the regulations imputes state action); *Northrip v. Federal Nat'l Mortg. Assoc.*, 527 F.2d 23 (6th Cir. 1975) (fact that foreclosure sale under Michigan's non-judicial foreclosure statute was conducted by sheriff and recorded by registrar of deeds was insufficient to create state action required by the Fourteenth Amendment); *Mildfelt v. Circuit Court of Jackson County*, 827 F.2d 343 (8th Cir. 1987) (no state action because Missouri's non-judicial foreclosure statute merely recognized the parties' right to contract to a power of sale provision and imposed only minimum standards for its exercise); and *Charmicor, Inc. v. Deaner*, 572 F.2d 694 (9th Cir. 1978) (Nevada's power of sale statute does not transform a private non-judicial foreclosure statute into state action, instead the statute creates only the right to act; it does not require that such action be taken). As noted by the Ninth Circuit in its opinion subject to the instant Petition, these decisions have not been seriously questioned in the intervening years.

The number and uniformity of these rulings, when taken in conjunction with this Court's decision in *Flagg Brothers,* further illustrate the soundness of the Ninth

Circuit's determination that no state action was present under the facts alleged in Petitioner's complaint. Given this well-established line of authority, review of the court of appeals' decision is especially unwarranted.

III. PETITIONER HAS RELIED ON NON-RECORD EVIDENCE

Petitioner's Statement of the Case represents that actions undertaken by quasi-federal agencies, commonly known as Fannie Mae and Freddie Mac, direct the secondary mortgage market to use Hawaii's non-judicial foreclosure process, and that one of the agencies, Freddie Mac, directed use of HRS § 667-5, prior to the foreclosure on Petitioner's property. *See* Petition at 6-9. This evidence was not presented to the district court and not otherwise considered by the court of appeals at the time it issued its merits ruling on April 4, 2003.

This Court has demonstrated a long-established reluctance to review decisions on the basis of non-record evidence not considered by the courts below. *See e.g.*, *Russell v. Southard*, 12 How. 139, 159 (1851) ("This court must affirm or reverse upon the case as it appears in the record"); and *Adickes v. Kress & Co.*, 398 U.S. 144, 157-58 n.16 (1970) ("Manifestly, it [an unsworn witness statement never considered by the trial court] cannot be properly considered by us in the disposition of the case"). The

Court should not consider the Petition in light of these purported directives.[1]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[1] So too, the Court should not consider Petitioner's reliance on R. H. Stauffer, *Land Tenure in Kahana, Hawai'i 1846-1920* (1990), which was not brought to the attention of the district court or the court of appeals at the time of their merits rulings.